

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIMBERLY R.,

Plaintiff,

v.

ANDREW M. SAUL,
Commissioner of Social Security,

Defendant.

CASE NO. C19-2064-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for supplemental security income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1975.¹ She completed tenth grade and has two years of college education, and previously worked as an in-home caregiver, food demonstrator,

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 receptionist, and warehouse worker. (AR 43, 222.)

2 Plaintiff applied for SSI in March 2014. (AR 200-05.) That application was denied and
 3 Plaintiff timely requested a hearing. (AR 117-20, 124-29.) In March and December 2016, ALJ
 4 Kimberly Boyce held hearings, taking testimony from Plaintiff and a vocational expert (VE). (AR
 5 33-85.) In April 2017, the ALJ issued a decision finding Plaintiff not disabled. (AR 13-27.)
 6 Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review in November
 7 2017 (AR 1-6), making the ALJ's decision the final decision of the Commissioner.

8 Plaintiff appealed this final decision of the Commissioner to this Court, which reversed the
 9 ALJ's decision and remanded the matter for further administrative proceedings. (AR 1074-93.)
 10 The ALJ held another hearing in August 2019 (AR 1020-40), and subsequently issued a decision
 11 finding Plaintiff not disabled. (AR 1002-12.) Plaintiff now seeks judicial review of the ALJ's
 12 decision.²

13 JURISDICTION

14 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

15 DISCUSSION

17 ² Plaintiff's opening brief lists only one assignment of error: "Whether the ALJ erred at step five
 18 of the sequential evaluation process." Dkt. 21 at 1. Plaintiff's brief goes on to assign error to additional
 19 parts of the ALJ's decision, namely the ALJ's development of the record, assessment of Plaintiff's
 20 testimony, RFC assessment, and assessment of a medical opinion. Dkt. 21 at 4-7. Although Plaintiff
 attempts to recast these additional arguments as part of the ALJ's step-five findings (Dkt. 26 at 1-2), this is
 not persuasive. That the ALJ ultimately found Plaintiff not disabled at step five does not transform every
 alleged error in the decision into a step-five error.

21 Furthermore, the purpose of the Court's scheduling order (Dkt. 20 at 2) requiring plaintiffs to list
 22 all issues beginning on the first page of a brief is to promote clarity and organization, and Plaintiff's opening
 23 brief does not clearly list her assignments of error in an organized fashion. Instead, the Commissioner and
 the Court must hunt through the brief to determine which issues are presented in this case. Counsel is
 admonished to list all discrete issues beginning on the first page of the opening brief in future cases, in
 compliance with the scheduling order, to avoid a stricken brief.

1 The Commissioner follows a five-step sequential evaluation process for determining
2 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
3 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
4 engaged in substantial gainful activity since the application date. (AR 1006.) At step two, it must
5 be determined whether a claimant suffers from a severe impairment. The ALJ found severe
6 Plaintiff's degenerative disc disease, fibromyalgia, obesity, chronic obstructive pulmonary
7 disease, asthma, learning disorder, dysthymic disorder, panic disorder, somatoform disorder, and
8 migraine headaches. (AR 1006.) Step three asks whether a claimant's impairments meet or equal
9 a listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria
10 of a listed impairment. (AR 1006-07.)

11 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
12 residual functional capacity (RFC) and determine at step four whether the claimant has
13 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
14 performing sedentary work with additional limitations: she can never climb ladders, ropes or
15 scaffolds; work at unprotected heights; or work in proximity to hazards such as heavy machinery,
16 blades, or dangerous moving parts. She can occasionally balance, stoop, kneel, crouch, and crawl.
17 She can occasionally reach overhead. She cannot have concentrated exposure to extreme cold,
18 vibrations, and/or respiratory irritants. She can understand, remember, and carry out unskilled,
19 routine, and repetitive work that can be learned by demonstration and in which tasks to be
20 performed are predetermined by the employer. She can cope with occasional work setting changes
21 and occasional interaction with supervisors. She can work in proximity to co-workers, but not in
22 a team or cooperative effort. She can perform work in a workspace to which the general public is
23 not admitted in the ordinary course of business. (AR 1007.)

1 Plaintiff has no past relevant work (AR 1010), and therefore the ALJ proceeded to step
2 five, where the burden shifts to the Commissioner to demonstrate that the claimant retains the
3 capacity to make an adjustment to work that exists in significant levels in the national economy.
4 With the assistance of the VE, the ALJ found Plaintiff capable of transitioning to other
5 representative occupations, such as bench hand, final assembler, laminator, and touch-up screener.
6 (AR 1010-11.)

7 This Court's review of the ALJ's decision is limited to whether the decision is in
8 accordance with the law and the findings supported by substantial evidence in the record as a
9 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
10 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
11 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
12 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
13 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
14 2002).

15 Plaintiff argues the ALJ erred in entering findings at step five and closing the record, also
16 includes additional miscellaneous assignments of error. The Commissioner argues that the ALJ's
17 decision is supported by substantial evidence and should be affirmed.

18 Step five

19 At step five, the Commissioner bears the burden to show that a claimant is not disabled
20 because he or she can perform other work that exists in significant numbers in the national
21 economy. 20 C.F.R. § 416.960(c)(2). The Dictionary of Occupational Titles (DOT) raises a
22 rebuttable presumption as to job classification. *Johnson v. Shalala*, 60 F.3d 1428, 1435-36 (9th
23 Cir. 1995). Pursuant to Social Security Ruling (SSR) 00-4p, an ALJ has an affirmative

1 responsibility to inquire as to whether a VE's testimony is consistent with the DOT and, if there is
2 a conflict, determine whether the VE's explanation for such a conflict is reasonable. *Massachi v.*
3 *Astrue*, 486 F.3d 1149, 1152-54 (9th Cir. 2007).

4 Plaintiff challenges several aspects of the ALJ's step-five findings. First, Plaintiff argues
5 that that the ALJ failed to meet the step-five burden because the jobs identified at step five are
6 inconsistent with Plaintiff's RFC assessment, namely her reaching ability. The ALJ found that
7 Plaintiff was limited to occasional overhead reaching. (AR 1007). The jobs identified at step five
8 all require frequent or constant reaching, but the VE testified that all of these jobs do not typically
9 require *overhead* reaching (which is the only type of reaching limited in the ALJ's RFC
10 assessment), and that any overhead reaching required in these jobs would not exceed occasional.
11 (AR 1035-38.) Plaintiff questions whether this testimony was persuasive to a "reasonable mind"
12 (Dkt. 21 at 9), but has not identified any portions of the VE's testimony that raise legitimate
13 concern. Plaintiff suggests that the VE's testimony is defective because he did not indicate the
14 degree of erosion that would occur due to the reaching limitation (Dkt. 26 at 3), but the VE did not
15 suggest that any of the step-five jobs would, under any circumstances, require more than
16 occasional reaching overhead. (AR 1036.) Thus, the VE did not suggest that any erosion would
17 occur. Because the VE was questioned about a potential conflict between the reaching
18 requirements of the jobs per the DOT and the hypothetical RFC, and offered a reasonable
19 explanation based on his experience and expertise, the ALJ did not err in relying on the VE's
20 testimony to find that Plaintiff could perform the step-five jobs despite her reaching restrictions.
21 *See Light v. Social Sec. Admin.*, 119 F.3d 789, 794 (9th Cir. 1997) (explaining that an ALJ may
22 rely on VE testimony that deviates from the DOT by either making specific findings of fact
23 regarding the claimant's RFC or by drawing inferences from the context of the VE's testimony).

1 Next, Plaintiff challenges the foundation for the VE's testimony as to the laminator job, a
2 job which the VE testified he had never observed, but had read about in a report written by his
3 colleagues. (AR 1036.) At the hearing, Plaintiff requested access to that report, but the ALJ
4 declined to require the VE to produce it after reciting the VE's decades of experience that formed
5 his expertise and the foundation for his testimony. (AR 1037-38.) Plaintiff has not shown that the
6 VE's testimony failed to contain sufficient indicia of reliability such that the ALJ erred in failing
7 to require the VE to produce his colleagues' report on the laminator job. *See Biestek v. Berryhill*,
8 __ U.S. __, 139 S.Ct. 1148, 1155-56 (2019).

9 Furthermore, even if the laminator job should have been eliminated for lack of foundation,
10 the other three jobs relied upon by the ALJ exist in significant numbers independently. (*See* AR
11 1011 (describing more than 57,000 total bench hand, final assembler, and touch-up screener jobs).)
12 Although Plaintiff urges the Court to consider whether each individual step-five jobs exists in
13 significant numbers, courts aggregate the job numbers to determine whether the Commissioner's
14 burden has been satisfied. *See, e.g., Shaibi v. Berryhill*, 883 F.3d 1102, 1110 n.7 (9th Cir. 2017).
15 Thus, even if the laminator job should have been eliminated for lack of foundation, the error would
16 be harmless in light of the number of other jobs identified at step five. *See id.*

17 Lastly, and for the first time on reply, Plaintiff argues that the ALJ erred in relying on the
18 final assembler job because it is defined as a light job, and the RFC assessment limited Plaintiff to
19 sedentary work. *See* DOT 713.684-018, *available at* 1991 WL 679262 (Jan. 1, 2016). Any error
20 related to this job is harmless because the other jobs relied upon exist in significant numbers even
21 without the final assembler jobs included. Indeed, the bench hand and touch-up screener jobs are
22 so numerous that even if the final assembler *and* laminator jobs had to be excluded due to errors
23 associated with them, the step-five findings would nonetheless remain valid.

1 For all of these reasons, Plaintiff has failed to show harmful error in the ALJ's step-five
2 findings.

3 Closing the record

4 On July 29, 2019, Plaintiff's counsel wrote a letter to the ALJ to explain that some medical
5 records were outstanding. (AR 1234.) Between that date and the August 6, 2019 hearing, Plaintiff
6 submitted some but not all of the outstanding records (AR 1237-84). At the hearing (AR 1023-
7 25) and in the decision (AR 1002-03), the ALJ explained that she found counsel's letter insufficient
8 to establish a compelling reason for the delay in submitting evidence and closed the record at that
9 time.

10 Plaintiff now argues that the ALJ should not have closed the record because she complied
11 with Social Security Ruling (SSR) 17-4p and because the ALJ referenced Plaintiff's lack of recent
12 treatment in the decision, but if the ALJ had been willing to consider additional evidence, it would
13 have shown that Plaintiff had in fact received treatment. Dkt. 21 at 5.

14 The Court disagrees with Plaintiff's first argument: that counsel's July 2019 letter satisfies
15 SSR 17-4p. That ruling requires that "it is only acceptable for a representative to inform us about
16 evidence without submitting it if the representative shows that, despite good faith efforts, he or she
17 could not obtain the evidence." 2017 WL 4736894, at *4 (Oct. 4, 2017). Counsel's letter does not
18 describe any particular efforts made to obtain the evidence: she merely claimed that "[a] good faith
19 attempt is being made to obtain these records prior to the hearing." (AR 1234.) The ALJ
20 reasonably found that counsel's letter fails to establish that she actively and diligently sought
21 evidence. (AR 1003).

22 The ALJ also found that counsel's July 2019 letter had failed to describe the outstanding
23 records with enough detail to permit the ALJ to understand how and why the records were relevant

1 to the disability determination. (AR 1003.) Plaintiff seems to suggest that her counsel's comments
2 at the hearing explained the relevance of the evidence (Dkt. 21 at 5), but those comments were not
3 provided to the ALJ five business days before the hearing, and thus do not satisfy the applicable
4 regulations. *See* 20 C.F.R. §§ 416.912, 416.1435; SSR 17-4p, 2017 WL 4736894, at *3 ("To
5 satisfy the claimant's obligation under the regulations to 'inform' us about written evidence, he or
6 she must provide information specific enough to identify the evidence . . . and show that the
7 evidence relates to the individual's medical condition, work activity, job history, medical
8 treatment, or other issues relevant to whether or not the individual is disabled or blind."). Thus,
9 the Court finds that SSR 17-4p does not provide a basis for finding that the ALJ abused her
10 discretion in closing the record.

11 As to Plaintiff's second contention — that the ALJ referenced a lack of recent records,
12 even though Plaintiff could have submitted such evidence had the ALJ not closed the record —
13 the ALJ's decision does reference a lack of record support for certain allegations. (AR 1006,
14 1009.) That the ALJ referenced a lack of record support for certain allegations does not establish
15 error in the ALJ's decision, however. It shows that the ALJ's decision to close the record may
16 have impacted certain findings, but not that the ALJ erred in closing the record. Thus, the Court
17 does not find that the text of the ALJ's decision provides a basis for finding that the ALJ abused
18 her discretion in closing the record.

19 Miscellaneous assignments of error

20 Plaintiff references several miscellaneous assignments of error under a section titled "The
21 ALJ's decision was not supported by substantial evidence." *See* Dkt. 21 at 6-7.

22 First, Plaintiff argues that the ALJ erred in assessing her RFC because the ALJ did not
23 include limitations based on Plaintiff's leg weakness nor limitations related to attendance and

1 productivity. The ALJ found that Plaintiff's leg weakness was not adequately documented in the
2 record, however, and Plaintiff has not shown that this finding is erroneous.³ (AR 1006.) That
3 evidence not in the record could establish an impairment related to Plaintiff's leg weakness (Dkt.
4 21 at 6) does not show that the ALJ erred in finding that the record before her did not adequately
5 establish leg weakness. Furthermore, the miscellaneous objective findings identified by Plaintiff
6 (Dkt. 21 at 6 (referencing positive straight leg test, elevated blood pressure and heart rate, difficulty
7 tandem walking)⁴) do not suggest any particular RFC limitations. Plaintiff also fails to point to
8 any evidence that establishes the existence of attendance or productivity limitations. For these
9 reasons, Plaintiff has failed to show that the ALJ erred in assessing her RFC.

10 Plaintiff goes on to contend that the previous court remand order suggested that the ALJ
11 had erred in failing to include limitations caused by Plaintiff's migraines in the RFC assessment.
12 Dkt. 21 at 6-7 (citing AR 1087). Plaintiff is mistaken. The prior court remand order explicitly
13 found that the ALJ provided legally sufficient reasons to discount Plaintiff's alleged limitations
14 caused by her migraines. (AR 1088.) And in the current decision, the ALJ incorporated the prior
15 assessment of Plaintiff's subjective allegations by reference, because it had been affirmed in the
16 prior court remand and the record did not indicate that Plaintiff's symptoms had worsened in the
17 interim time. (AR 1008-09.) Plaintiff has not addressed the ALJ's stated reasoning on this issue
18

19 ³ Plaintiff contends that evidence before the ALJ establishes that she complained of leg weakness
20 to her primary care provider and was referred to a neurologist for further testing. Dkt. 21 at 6 (citing AR
21 1260, 1263). The cited pages do not reference either leg weakness or a neurology referral, but a different
22 treatment note does. (AR 1248-51 (May 2019 treatment note).) As noted by the ALJ at the hearing,
23 however, a new diagnosis in June 2019 or later would not satisfy the durational requirement by the time of
the ALJ's August 2019 decision. (AR 1024-25.) Thus, Plaintiff has not shown that the ALJ erred in failing
to account for the minimal evidence of leg weakness in the record.

⁴ Plaintiff also states that the record shows that she had decreased strength, but the cited record
references normal muscle strength. Dkt. 21 at 6 (citing AR 1263).

1 or shown error in this part of the ALJ's decision.

2 Lastly, Plaintiff argues that the ALJ erred in discounting a treating physician's opinion.
3 Dkt. 21 at 7. Peter Struck, M.D., completed a form opinion in April 2019, describing Plaintiff's
4 symptoms and limitations but leaving blank all sections asking him to list the objective evidence
5 supporting his opinion. (AR 1235-36.) The ALJ gave little weight to Dr. Struck's opinion, finding
6 it inconsistent with the longitudinal medical record showing Plaintiff had improved with treatment
7 and displayed good coordination, strength, and tone. (AR 1009.) Plaintiff baldly states that the
8 ALJ's reasons were insufficient (Dkt. 21 at 7), but fails to explain why, and thus her assignment
9 of error fails. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)
10 (declining to address assertions unaccompanied by legal arguments: "We require contentions to
11 be accompanied by reasons."). Furthermore, Plaintiff argues that Dr. Struck's opinion was based
12 on objective evidence "as stated on the opinion form he submitted" (Dkt. 21 at 7), but Dr. Struck
13 did not identify any objective evidence supporting his opinion. (AR 1235-36.) Plaintiff has not
14 shown that the ALJ erred in discounting Dr. Struck's opinion.

15 **CONCLUSION**

16 For the reasons set forth above, this matter is AFFIRMED.

17 DATED this 6th day of November, 2020.

18 

19 Mary Alice Theiler
20 United States Magistrate Judge
21
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23